U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536

[redacted]

File: WAC 00 136 53610 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of California in March of 1997. It claims to be engaged in wholesale trading of general merchandise. It seeks to employ the beneficiary as its president. Accordingly, it endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in an executive or managerial capacity. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner asserts that the director erred in denying the petition because the beneficiary would be working in an executive capacity as the petitioner's chief executive officer. Counsel also submits additional evidence and asserts this evidence demonstrates that the petitioner has the ability to pay the proffered wage.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

The petitioner initially provided a description of the beneficiary's proposed duties for the petitioner as follows:

1) Have managerial responsibility of planning, directing and managing overall business operations of our company;
2) Plan, administer and develop the company's commercial and financial goals and objectives;
3) Exercise discretion over the day-to-day operations of the business activities;
4) Exercise discretion over the operations of financial department;
5) Supervise and schedule the work of employees;
6) Exercise authority to hire/fire executive staff; and
7) Report to the parent company . . .

The petitioner also provided its organizational chart depicting the following filled positions:

President (to be filled by the beneficiary)
Vice President
Office Manager
Finance and Accounting Manager
Sales Engineer/Manager
Salesman
Traffic and Warehousing Manager

The director requested the identity of and a brief description of job duties for all the employees under the beneficiary's

supervision. The director also requested copies of the petitioner's California Form DE-6, Quarterly Wage Reports.

In response, counsel for the petitioner stated that the beneficiary supervised the vice-president, the shipping manager/customs broker, and the office manager. Counsel noted that the beneficiary did not directly supervise the petitioner's other three employees but did have ultimate decision-making authority over all personnel decisions. Counsel also stated that the beneficiary would be responsible for the following duties:

> [The beneficiary] is expected to meet with industry leaders, lending institutions, medical facilities and trade organizations in the United States in order to gather a fuller knowledge and understanding of the North American pharmaceutical marketplace. Through his research, the beneficiary will establish ongoing relationships with these organizations and develop a long-term plan aimed at ensuring and increasing [the petitioner's] share of the market. His duties will include analyzing marketing and sales figures compiled by the Vice President of Marketing and Trade Division in order to determine budgetary expenditures towards new product lines and advertising campaigns and to ensure responsible and visionary fiscal planning for the company.

The petitioner also provided its California DE-6 Forms, Quarterly Wage Reports for the year 2000. The DE-6 Forms revealed six employees for the first quarter and five employees for the subsequent quarters of the year.

The director determined that the beneficiary was not an executive or manager because he would not supervise and control the work of other supervisory, professional, or managerial employees.

On appeal, counsel for the petitioner asserts that the Service erred when it failed to consider the reasonable needs of the petitioner. Counsel also asserts that the beneficiary will not perform non-managerial tasks but will manage and oversee these functions through his supervision of the petitioner's various managers and independent contractors. Counsel also states that the regulations focus on the beneficiary's primary activities and do not preclude the beneficiary or other managerial employees from performing other activities as well.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner initially submitted a broad and general description of the beneficiary's duties for the petitioner. The petitioner's position description states that the beneficiary would have the responsibility of "planning, directing

and managing overall business operations," and "exercise authority to hire/fire executive staff," and would "exercise discretion over the day-to-day operations of the business activities" and the financial department. These statements merely paraphrase certain elements of the statutory definition of "managerial capacity" and "executive capacity" without describing the actual duties of the beneficiary with respect to the daily operations. The petitioner's reference to the beneficiary meeting with other organizations to better understand the marketplace is more indicative of an individual learning the company business rather than an individual performing managerial or executive duties in relation to the business. The petitioner's reference to the beneficiary analyzing marketing and sales figures to determine budgetary expenditures is indicative of an individual providing basic financial services to the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel's statement that the regulations do not preclude the beneficiary or other managerial employees from performing some non-managerial activities is correct. However, in this case the record is deficient in describing the managerial or executive aspects of the beneficiary's position let alone substantiating that the beneficiary's assignment is primarily executive or managerial in nature. Moreover, counsel's assertion that the beneficiary will manage and oversee the non-managerial functions through his supervision of the petitioner's managers and independent contractors is not supported by the record. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not provided evidence that it employs independent contractors. The petitioner has provided confusing information regarding the beneficiary's proposed duties with respect to the vice-president and the four subordinate "managers." The petitioner's organizational hierarchy provided with the petition shows that the president supervises the vice-president and that the vice-president supervises the petitioner's four "managers." The organizational chart shows only one individual employee that is subordinate to a "manager." However, the petitioner's response through its counsel to the director's request for evidence states that the beneficiary will be responsible for supervising the vice-president, the shipping manager, and the office manager. It is unclear who supervises the two other "managers" and the salesman. The record thus provides two very different views of the petitioner's organizational structure. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Furthermore, when comparing the names of the individuals actually employed by the petitioner according to the California DE-6 Forms submitted at the time of filing the petition, further inconsistencies arise. One individual who was identified as the accounting manager at the time the petition was filed, is now on appeal subordinate to the office manager and is identified as the administrative assistant. The petitioner does not provide an explanation of the shift in personnel title and position.

In addition, counsel has noted on appeal the addition of two new employees to the petitioner's roster. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971).

Further, counsel's reference on appeal to unpublished decisions is without merit. Counsel has not provided any facts that the instant case is analogous to either case cited. Furthermore, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Counsel's assertion that the beneficiary manages an essential function is also without merit. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). The petitioner has not provided evidence that the beneficiary would manage a function rather than executing the function.

Although it appears the director based his decision partially on the size of the enterprise, it is not clear that the director considered the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing the petitioner was a three-year-old trading company that claimed to have a gross annual income of $1,802,778. The firm employed a vice-president, a shipping manager, an office manager, an accounting manager/administrative assistant, and a sales representative. The petitioner has not provided supporting evidence that it employed independent contractors. The petitioner has not established the necessity of additional "managerial or executive" personnel to carry out its operations. The petitioner has not provided sufficient information to determine whether the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish

that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The record contains insufficient evidence to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position would be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties fail to sufficiently describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established the ability to pay the beneficiary the proffered wage of $35,000 per year.

8 C.F.R 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The director determined that a review of the petitioner's 1998 and 1999 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return revealed net losses for both years. The director also noted that the petitioner's net assets for the 1999 year were only marginally greater than the proposed salary. The director concluded that the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel submits the petitioner's 2000 IRS Form 1120. Counsel asserts that the director failed to consider the petitioner's financial condition in the year 2000, the priority date for the petition. Counsel also asserts that the petitioner's claimed parent company has been established for over 60 years and has transferred monies to the petitioner in the past as needed and that this practice is expected to continue. Counsel asserts that the petitioner has established its ability to pay the proffered wage.

Counsel's assertions are not persuasive. Neither counsel nor the petitioner submitted the petitioner's 2000 IRS Form 1120 for the consideration of the director. Even if the IRS Form 1120 had not been prepared as of the date the request for additional evidence was due, the director had requested in the alternative audited financial statements. Although the director appeared to limit his request to the year 1999, the director detailed the type of evidence required to establish the petitioner's ability to pay. This evidence was not forthcoming from the petitioner.

However, even a review of the petitioner's IRS Form 1120 for the year 2000 does not establish the petitioner's ability to pay. In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986)(citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); see also Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Texas 1989); K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F.Supp. 647 (N.D.Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In K.C.P. Food Co., Inc. v. Sava, the court held the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The petitioner's IRS Form 1120 reveals taxable net income of $26,370, an amount noted by counsel as marginally less than the $35,000 wage proffered to the beneficiary. Counsel's statement that the petitioner's claimed parent company would continue to support the petitioner financially is not relevant to this issue. The petitioner must be an established concern and the petitioner must demonstrate its ability to pay the proffered wage without reliance on outside companies. The petitioner's reliance on a foreign entity to pay the proffered wage is speculative.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the foreign entity in

this case. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

The petitioner has provided its share certificate number 5 issuing 39,000 shares of common stock to the petitioner's claimed parent company. The share certificate is dated December 16, 1997. The petitioner has also provided its share certificate number 2 issuing 11,000 shares to an individual. The petitioner's share certificate number 3 likewise is issued to an individual but in the amount of 10,000 shares. These two share certificates are dated in March of 1998. The petitioner's stock transfer ledger reveals that the petitioner's claimed parent company made the transfers to these individuals in March of 1998. The record does not demonstrate that the petitioner's claimed parent company retains a majority interest in the petitioner. The stock certificate numbers are not chronological and it appears that the claimed parent company transferred a portion of its shares to the two individuals. As noted above, it is incumbent upon the petitioner to resolve inconsistencies by independent objective evidence. Matter of Ho, supra. For this additional reason, the petition may not be approved.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.